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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-81

VETERANS AND RESERVISTS FOR PEACE IN VIETNAM, PETITIONER

v.

REGIONAL COMMISSIONER OF CUSTOMS, REGION II, AND SECRETARY OF THE TREASURY OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a–19a) is reported at 459 F. 2d 676. The opinion of the district court (Pet. App. 20a–23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered May 4, 1972. The petition for a writ of certiorari was filed July 14, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the statutory and regulatory licensing system applicable in time of war or national emergency to transactions involving the importation of property from a hostile country (North Vietnam) constitutes an impermissible interference with the First Amendment if the property in question consists of unsolicited foreign publications.

2. Whether the Trading with the Enemy Act is unconstitutionally overbroad.

STATUTE AND REGULATIONS INVOLVED

The Trading with the Enemy Act, 50 U.S.C. App. 5(b), is set forth in relevant part at Pet. App. 1a. The Foreign Assets Control Regulations, 31 C.F.R. Part 500, are set forth in pertinent part at Pet. App. 2a–6a.

STATEMENT

The material facts in this case are not disputed. By letter dated February 17, 1970, petitioner, an unincorporated association, was notified that a package of literature from Hanoi, North Vietnam, addressed to it, was being detained by customs authorities.[1] It would be released, the letter advised, upon petitioner's presentation of either a certificate of origin—stating that the materials did not originate from, and were not manufactured in, North Vietnam or Mainland China—or a Foreign Assets Control License, which was obtainable within 90

[1]The package was sent by "Ubavanhoa," the principal propaganda organization for the North Vietnamese Government.

days of notification on application to the Federal Reserve Bank of New York (see Pet. App. 24a–27a).

Petitioner, rather than invoking the available administrative procedures to obtain the literature, commenced this civil suit in the United States District Court for the Eastern District of Pennsylvania, seeking both declaratory and injunctive relief. It claimed that the Trading with the Enemy Act, 50 U.S.C. App. 5(b),[2] and the Foreign Assets Control Regulations promulgated thereunder, 31 C.F.R. Part 500,[3] estab-

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[2] Section 5(b) of the Act authorizes the President, in time of war or national emergency, to regulate or prohibit transactions "involving, any property in which any foreign country or a national thereof has an interest." In May 1964, North Vietnam was added to the list of hostile countries, the property of which was subject to regulation. 31 C.F.R. 500.201. Mainland China and North Korea, both of which were on the list of designated hostile countries when this suit was commenced, have recently been removed from the list.

That the United States is currently in a state of national emergency was most recently reaffirmed by President Johnson in January 1968 (E.O. 11387, 33 Fed. Reg. 47).

[3] Section 500.204(a) of the regulations prohibits unauthorized dealings in merchandise originating in North Vietnam and elsewhere. Licenses for the importation of films and publications from North Vietnam are obtainable if such materials are *bona fide* gifts not involving "any direct or indirect * * * commercial benefit to [the] designated countries," are paid for by making payments into blocked accounts, are sent to libraries, universities or research and scientific institutions, or are received in "exchange for publications from the United States." 31 C.F.R. 500.204 App. ¶ 108.

The licensing procedures are set forth in Section 500.801(b) of the regulations. Final decisions on license applications are made by the Treasury Department Office of Foreign Assets Control or by the Federal Reserve Bank of New York. 31 C.F.R. 500.803.

lish an unconstitutional delegation of legislative power and, insofar as they regulate receipt of unsolicited publications, constitute an unwarranted infringement of First Amendment freedom of speech.

Following a hearing on cross-motions for summary judgment and on petitioner's request for the convening of a three-judge court, the district court granted respondents' summary judgment motion. Finding this case virtually indistinguishable from *Teague* v. *Regional Commissioner of Customs*, 404 F. 2d 441 (C.A. 2), certiorari denied, 394 U.S. 977, the court concluded (Pet. App. 21a–22a) that here, as in *Teague*, the possible incidental interference with First Amendment freedoms that might result from enforcement of the statute and regulations was on balance permissible in view of the overriding legislative purpose served by the licensing requirement. This determination could properly be made by a single judge, the court held (Pet. App. 22a), because "in a long line of decisions the constitutionality of the Statute in the case sub judice has been upheld." The court of appeals affirmed (Pet. App. 7a–19a).

ARGUMENT

1. Petitioner casts its arguments in this Court essentially on First Amendment grounds, asserting that the foreign assets licensing system imposes an impermissible prior restraint on speech and press freedoms where, as here, the property shipped into the United States is unsolicited literature. It places principal reliance on this Court's decision in *Lamont* v. *Postmaster General*, 381 U.S. 301.

Lamont also involved the regulation of unsolicited foreign publications mailed to this country from abroad. But the statute that was declared unconstitutional in that case, the Postal Service and Federal Employees Salary Act of 1962, 39 U.S.C. (1964 ed.) 4008(a), was by its terms materially different from the Trading with the Enemy Act that is being challenged here. The former statute specifically provided for the retention by postal authorities of all "[m]ail matter * * * which originates or which is printed or otherwise prepared in a foreign country" if the Secretary of the Treasury had determined that it was "'communist political propaganda'"; the delivery of such mail was conditioned upon the written request of the addressee. See 39 U.S.C. (1964 ed.) 4008(a). This procedure, the Court concluded in *Lamont* (381 U.S. at 306), was enacted by Congress to permit "federal agencies [to] regulate the flow of mail." The Act focused on literature and assigned governmental officials the responsibility for monitoring the ideological content of the publication. In speaking to the legislative purpose, the Court stated (*ibid*): "The Act sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail." So direct an interference with the free flow of ideas to the public, it was held (381 U.S. at 307), "amounts * * * to an unconstitutional abridgment of the addressee's First Amendment rights." There was concededly no support for the statute "'in large public interests such as would be needed to justify a true

restriction upon freedom of expression or inquiry' " (381 U.S. at 309; Mr. Justice Brennan, concurring).

The present statutory and regulatory licensing system is poles apart. The Trading with the Enemy Act, and the licensing regulations promulgated under it, reflect a legitimate governmental purpose involving substantial public interests. They are aimed not at literature *per se* or "communist propaganda" from abroad, but, as noted below (Pet. App. 14a), at all transactions "concerning property in which an enemy has an economic interest." Thus, their focus is constitutionally neutral, and they apply only incidentally to publications. The legislative purpose in regulating such transactions is to restrict the flow of American dollars to a few specified hostile nations (see n. 2, p. 3, *supra*) in return for merchandise shipped from such countries. As the court of appeals stated (Pet. App. 11a–12a):

> There is little doubt regarding the propriety of the purpose of the Trading with the Enemy Act. Its obvious goal is to prevent countries such as North Vietnam and Communist China from deriving any economic benefit from transactions with persons subject to the jurisdiction of the United States. Considering the state of our relationship with North Vietnam, and that money is an important weapon in any international struggle, we conclude that the Congressional design under-pinning the Act is wholly proper. * * *[4]

[4] See also *Banco National de Cuba* v. *Sabbatino*, 376 U.S. 398, 412; *Teague* v. *Regional Commissioner of Customs*, *supra*; *Sardino* v. *Federal Reserve Bank of New York*, 361 F.2d 106 (C.A. 2), certiorari denied, 385 U.S. 898.

We do not dispute that where, as here, packages shipped to this country from North Vietnam contain publications originating in that country, First Amendment interests are implicated. See *Kleindienst* v. *Mandel,* No. 71–16, decided June 29, 1972, slip op. 9–12.[5] But the licensing procedures required by the statute and regulations involved in this case are not concerned with the content of the package; their purpose is not to restrict the flow of information or ideas. To the extent that they affect the exercise of First Amendment freedoms, the intrusion is, unlike *Lamont,*[6] "only incidental to the proper general purpose of the regulations: restricting the dollar flow to hostile nations." *Teague* v. *Regional Commissioner of Customs, supra,* 404 F.2d. at 445. Nor is there any censorship of selected materials; as pointed out in *Teague* (*ibid.*), "all publications from the specified nations are treated alike. 31 C.F.R. § 500. 204 App. ¶ 108 (1968)."[7]

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[5] As this Court made clear in *Mandel* (slip op. 9), the nonresident alien addressor of the package has no constitutional rights protected under the First Amendment. The only rights to free speech and press that are at all involved here are those of the American addressee.

[6] See Mr. Justice Brennan's concurring opinion in *Lamont* v. *Postmaster General, supra,* 381 U.S. at 308–309; and see *Zemel* v. *Rusk,* 381 U.S. 1, 16–17.

[7] The regulation is set forth at Pet. App. 4a. As the court below pointed out (Pet. App. 17a), the administrative determinations regarding approvals of license applications for receipt of foreign films or publications "go only to the factual questions regarding the financial aspects of the transaction and not to a decision based on the contents of the material."

In *United States* v. *O'Brien,* 391 U.S. 367, 376–377, this Court stated:

> * * * This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. * * * [W]e think it clear that a Government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. * * *

That is the test to be applied here. See *Teague* v. *Regional Commission of Customs, supra,* 404 F.2d at 446. We think that the court of appeals struck the proper balance in declaring that the claimed infringement on the free flow of information in this case is permissible as incidental to the proper, important, and substantial "nonspeech" purpose of the statute and the regulations.

Petitioner's argument to the contrary is not based on an assertion that the license requirement prevents it from receiving the publications from North Vietnam. As we have already noted, the Foreign Assets Control regulations specifically provide for the release to the addressee of all films and publications from that country if the payments for them are made to blocked accounts or if the material is sent as *"bona*

fide gifts to the importers * * *" (31 C.F.R. 500.204 App. ¶ 108 (emphasis supplied); Pet. App. 4a). And the publications are available at "universities, libraries, [and] research and scientific institutions" (*ibid.*), which are permitted to receive them without restriction as to payment.

Petitioner's First Amendment claim rests essentially on the alleged burdens and delays that it speculates inhere in the processing of the license application.[8] Since petitioner never applied for a license, it

[8] Petitioner also objects to the "licensing procedure" as an infringement of its right to anonymity. Anonymity, however, is not in itself a constitutional right; a citizen is entitled under the First Amendment to resist compelled disclosure of his identity when there exists a direct link between his identification and the content of his speech or writings. But where speech and press freedoms are not directly involved, the First Amendment does not guarantee anonymity. That is the case here. Just as the recipient of a package of cloth from North Vietnam would not be in a position to refuse on First Amendment grounds to comply with the licensing procedures for fear of "loss of anonymity," so, too, petitioner should not be able to invoke such an argument simply because its package contained unsolicited publications. It is not being asked to disclose its identity because of its personal views, opinions or expressions. There have been no "allegations or proof that the purpose of the recordation is to embarrass the recipient of materials or to chill the exercise of his right to receive them" (Pet. App. 18a).

Rather, as the court of appeals stated (Pet. App. 17a-18a), "the necessity to maintain records of this sort appears to be an important adjunct to the adequate control and regulation of the flow of cash to certain countries. Such records enable the Office of Foreign Assets Control to check the prior importation of materials from the enumerated countries by individual applicants, and perhaps facilitate the detection of patterns of conduct indicative of violations of the act. Where there is a need to regulate, it is essential to record the regulatory activity."

is questionable whether petitioner is now in a position to complain on this ground; the only delay involved in this case has resulted from the association's own decision to institute the present action rather than invoke the administrative process.

In any event, the court below correctly determined that the "burden" imposed by filling out the application is not "unreasonable or excessive" (Pet. App. 16a), and that the delay in processing the application "would not appear to be extraordinarily lengthy" (Pet. App. 17a). "The only delay", as pointed out in *Teague* v. *Regional Commissioner of Customs, supra,* 404 F.2d at 446, "is that required to determine that money is not being sent to one of the designated nations * * *"; that determination can be made quickly.[9]

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[9] In *Teague* v. *Regional Commissioner of Customs, supra,* 404 F.2d at 446, the Second Circuit noted: "The district court found that a license application can typically be processed within 10 days." Unlike *Freedman* v. *Maryland,* 380 U.S. 51, on which petitioner places heavy reliance, there is no inquiry here into the content of the detained materials. Compare *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363.

Contrary to petitioner's speculation, the applicant is not put to a difficult burden of proof by the licensing procedure. For example, as noted by the court below (Pet. App. 18a), "in this case, the only inquiry which would be before the Office of Foreign Assets Control would be whether payments would be made, if at all, in such a manner that the funds would be likely to be available to the listed country." A negative response to the question on the application form asking whether the applicant did pay directly or indirectly for the merchandise, or intended to do so, if "followed by the certification of truth

Finally, what this Court observed in *United States* v. *O'Brien, supra,* 391 U.S. at 381–382, is equally applicable here: "[B]oth the government interest and the operation of the * * * [statute and regulations] are limited to the noncommunicative aspect of [the] conduct." *United States* v. *O'Brien, supra,* 391 U.S. at 381–382. The court of appeals was therefore correct in upholding the statutory and regulatory licensing system involved here against petitioner's First Amendment challenge.

2. Petitioner also asserts that the Trading with the Enemy Act is, in event, unconstitutionally overbroad.[10]

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printed on the form and the applicant's signature" (Pet. App. 18a–19a), would, the court of appeals stated (Pet. App. 19a), "satisfy the Act and regulations and thereby mandate that the materials be released, unless the Office of Foreign Assets Control possessed contrary information from another source."

[10] The claims that the Act is unconstitutional because it delegates legislative power to the President without fixing standards, and that the regulations must also fall because the President may not, in any event, constitutionally delegate his authority to the Secretary of the Treasury (7 Fed. Reg. 1409) or the Director of Foreign Assets Control (32 Fed. Reg. 3472), have been consistently rejected by the federal courts. See *Teague* v. *Regional Commissioner of Customs, supra,* 404 F.2d at 445; *Sardino* v. *Federal Reserve Bank, supra,* 361 F.2d at 110; *United States* v. *Von Clemm,* 136 F.2d 968 (C.A. 2), certiorari denied, 320 U.S. 769; and see *Campbell* v. *Chase National Bank,* 5 F. Supp 156, 172–174 (S.D.N.Y.), affirmed, 71 F.2d 669, (C.A. 2), certiorari denied, 293 U.S. 592; *Hartmann* v. *Federal Reserve Bank,* 55 F. Supp 801, 804 (E.D. Pa.); *Orrin* v. *Secretary of the Treasury,* D.D.C., Civ. No. 2408–69, decided April 27, 1972; *American Documentary Films* v. *Secretary of the Treasury,* S.D.N.Y., No. 72 Civ. 1711, decided July 5, 1972.

This contention was fully considered by the court of appeals and was properly rejected in its careful opinion on which we rely here (Pet. App. 9a–14a).

We add only the observation that petitioner's suggestion that this Court construe the statute narrowly to apply to the regulation of "commercial transactions only" (Pet. 11) would most likely result in greater, rather than less, interference with First Amendment rights. For, to carve out from the statutory term "property" an exception for all packages containing publications, films, or other literature would require the government to examine the contents of each parcel sent from a hostile country to ascertain whether it should be detained as a "commercial transaction" or released under petitioner's proposed exception. And even as to packages of written material, a separate determination would have to be made as to whether the writings are by nature "commercial" or "non-commercial." Such governmental interference with the free flow of information would be far more offensive, we submit, than the present detention of all packages from specified countries without regard to their content, pending the issuance of a license based on the addressee's certification of the nature of the property and transaction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972